Supreme Court, U.S.
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No. 99 1118

In The

Supreme Court

of the

United States

October Term, 1998

KAMAL PATEL,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I.

Whether the Fifth Circuit Court of Appeals correctly denied the Petitioner's request for a certificate of appealability, as the issues presented in his motion under 28 U.S.C. § 2255 adequately detailed a denial of his constitutional right to effective assistance of counsel, and were thereby deserving of encouragement for further review following the district court's denial of his § 2255 motion.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISION INVOLVED...	2
STATEMENT OF THE CASE.....	3
REASON FOR GRANTING THE WRIT.....	5

I. The Fifth Circuit erred in denying Petitioner's request for a certificate of appealability

II. The Petitioner included sufficient evidence in his § 2255 motion to obtain a certificate of appealability

CONCLUSION.....	23
APPENDIX 1	1a
APPENDIX 2	2a
APPENDIX 3	4a
APPENDIX 4	6a
APPENDIX 5	9a

BEST AVAILABL

TABLE OF AUTHORITIES

Hernandez v. Johnson, 108 F.3d 554 (5th Cir. 1997) 14

Martin v. Kemp, 760 F.2d 1244 (11th C. 1985) 10

Sonnier v. Johnson, 161 F.3d 941 (5th Cir. 1998) 6

Trevino v. Johnson, 168 F.3d 173 (5th Cir. 1999) 6

United States v. Garza, 165 F.3d 312 (5th Cir. 1999) 6

United States v. Greig, 967 F.2d 1018 (5th Cir. 1992) 14,15

United States v. Martinez, 151 F.3d 384 (5th Cir. 1998) 13

United States v. Winn 948 F.2d 145 (5th Cir. 1991) 8,21

Vance v. Lehman, 64 F.3d 119 (3rd C. 1995) 16

Vega v. Johnson, 149 F.3d 354 (5th Cir. 1998) 13

Statute Cited

28 USC § 2253 2

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The Petitioner, Kamal Patel respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit denying the Petitioner's Petition for Rehearing and filed on September 23, 1999, was not published, but is attached hereto as Appendix 1. The Fifth Circuit opinion denying the Petitioner's request for a certificate of appealability filed on August 4,1999, was not published, but is attached hereto as Appendix 2. The district court's order of November 4, 1998, denying the Petitioner's request for a certificate of appealability was not published, but is attached as Appendix 3. The district court's judgment and order filed September 1, 1998, dismissing the

Petitioner's motion under 28 USC § 2255 was not published, but is attached hereto as Appendix 4. The Magistrate Judge's Report and Recommendation of August 17, 1998, is attached hereto as Appendix 5.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 23, 1999. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291 and Supreme Court Rule 12.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title 28 of the United States Code § 2253 are set forth below:

> (c)(1)Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> * * *

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On January 21, 1992, the Petitioner was named in two count indictment charging him with conspiracy to import heroin and conspiracy to possess with the intent to distribute heroin. This offense was a Nigerian importation scheme. The Petitioner obtained Gerald Goldstein as his counsel. After a bond revocation hearing, the Government contended that the defense submitted perjurous testimony. As a result of this hearing, on April 22, 1992, additional charges were filed against the Petitioner, including fraud and use of false statements.

The Petitioner, on November 2, 1992, entered into a plea agreement, which contained sentencing stipulations, and an

appeal waiver, as it related to sentencing. On March 4, 1993, the Petitioner was sentenced to 293 months incarceration. No appeal was filed from the sentencing.

On or about April 23, 1997, the Petitioner filed a motion pursuant to 28 U.S.C. § 2255 with the district court. The Petitioner later amended his § 2255 motion, to add additional facts. The Government responded to the petition, and on August 17, 1998, Magistrate Capelle, without a hearing, filed a report and recommendation suggesting the § 2255 motion be denied in its entirety. (Magistrate Judge's Report and Recommendation, Appendix 5). Over objection by the Petitioner, this recommendation was adopted by the district court on September 1, 1998. (Order Denying Petitioner's Motion under 28 U.S.C. § 2255, Appendix 4). A motion for reconsideration was denied on September 17, 1998, and on November 4, 1998, the district court denied a certificate of appealability. (Order

Denying Petitioner's Certificate of Appealability, Appendix 3).

The Petitioner next requested a certificate of appealability from the Fifth Circuit Court of Appeals. On August 4, 1999, Judge Politz denied a certificate of appealability on all issues. (Order Denying Petitioner's Certificate of Appealability Petitioner filed a petition for rehearing and suggestion for rehearing en banc. On September 23, 1999, The Fifth Circuit denied the petition for rehearing. (Order Denying Petition for Rehearing, Appendix 1).

REASONS FOR GRANTING THE WRIT

I.

In order to issue a certificate of appealability, a court must find that the Petitioner has made a substantial showing of the denial of a constitutional right. The Fifth Circuit has determined that a substantial showing is one where:(1) the

issue is debatable among jurists of reason; (2) that a court could resolve the issues differently; or (3) that the questions warrant further review. *Trevino v. Johnson*, 168 F.3d 173, 177 (5th Cir. 1999). A defendant need not prove that he will win on the merits to obtain certificate; rather, he must only prove the matter debatable. *United States v. Garza*, 165 F.3d 312, 314 (5th Cir. 1999). Further, the court has held "We resolve any doubt about entitlement to a CERTIFICATE OF APPEALABILITY in favor of granting it." *Sonnier v. Johnson*, 161 F.3d 941, 943 (5th Cir. 1998).

Had the Circuit Judge properly used these standards, the outcome would have resulted in the grant of a certificate of appealability in the Petitioner's case. The Petitioner presented substantial proof of evidence outside of the record to support each of his constitutional claims. For example, as to the conflict of interest

claim regarding counsel being under investigation for a federal offense by the same Assistant United States Attorney at the time of the Petitioner's prosecution, the Petitioner presented the affidavits of two potential witnesses, including a member of the bar, to show that counsel was in fact under investigation. The Government did not deny that counsel was under investigation at the time, but simply denied that it had any impact on counsel's representation. However, there was no evidentiary hearing in this matter, and counsel did not provide an affidavit on the subject. The magistrate, in denying this claim without a hearing, found that there was no evidence former counsel was aware of the investigation, but later found that the investigation "annoyed" former counsel. There was therefore abundant evidence presented that counsel was acting under a conflict.

The Petitioner also made a significant

showing of prejudice. The Petitioner pointed out that his attorney counseled the Petitioner to plead guilty through an agreement which resulted in a higher sentence than if the Petitioner would have went to trial and lost. Specifically, the agreement, as counseled by Goldstein, required the Petitioner to stipulate to an amount of drugs, a role enhancement, an obstruction of justice enhancement, more than minimal planning, that the counts were not closely related for grouping purposes (in violation of the Fifth Circuit case of *United States v. Winn* 948 F.2d 145 (5th Cir. 1991)), use of a weapon, and complete cooperation for life with authorities without any possibility of a downward departure for his assistance. Furthermore, the plea outlined that despite reaching an agreement on these numerous offense enhancements the Government could move for an upward departure at sentencing for committing an offense while on release.

Additionally, the plea required the Petitioner's mother to plead guilty to an offense relating to perjury. The Government did not even agree to any acceptance of responsibility adjustment. The erroneous adjustments in the Guidelines, again counseled by Goldstein, resulted in a sentence a minimum 31 months longer then would have been possible under the correct Guidelines and by taking the matter to trial and losing. The magistrate, in denying the claim, admitted that the counseled plea resulted in a longer sentence. This evidence clearly warranted a certificate of appealability on this issue.

The Petitioner also presented numerous other pieces of evidence which provided a prima facie showing of the denial of constitutional rights. As to the Petitioner's probable cause/prosecutorial misconduct issue, the Petitioner provided the Court with evidence, iva the AUSA's own

file folder, that a file was not opened on the Petitioner's mother until after threats of prosecution began, in violation of *Martin v. Kemp*, 760 F.2d 1244 (11th C. 1985), which holds that prosecution may not threaten prosecution of a third person in order to obtain a plea without having probable cause to prosecute that third person.

Further, the Petitioner provided his own affidavit, which outlined his conversations with counsel regarding counsel's coercion in obtaining the plea, including counsel's threats to withdraw unless a plea was made. The magistrate, in denying this claim, found that it was proper for counsel to make this threat. No counter affidavits were filed to refute the allegations of the Petitioner which occurred outside the record; yet this was held to be insufficient to prove a substantial showing of a constitutional claim, or to trigger the need for an

evidentiary hearing to determine the merits of the issues raised in Petitioner's affidavit.

The Petitioner also raised an issue that his counsel provided ineffective assistance by arguing against his interests at sentencing. Specifically, at sentencing, Petitioner's counsel argued

> "I want to advise the court that I, as his counsel, am not happy with my client, and the record shall so reflect. His conduct at the bond hearing, I think manipulated and embarrassed his lawyer, compromised our judicial process in a serious fashion and compromised and has placed family members and loved ones in jeopardy, not to mention the considerable efforts and expense that the government has been required to undergo.

> I have not participated in a more egregious situation with respect to that kind of problem. The court may be surprised that a lawyer would be standing here saying that to the court, but I have notified the family and advised them of my feelings and asked that a different lawyer be selected to stand here."

The magistrate, in denying this argument, found that because counsel successfully argued against an upward departure at sentencing, that there was proof that counsel was not ineffective. However, counsel never advocated for a reduction in the Petitioner's sentence, and in fact, at one point in the sentencing hearing, argued for the high end of the Guidelines range. Such uncontroverted evidence warrants a certificate of appealability.

In sum, the Petitioner submits that the Circuit Judge either used the wrong

standard or improperly weighed the evidence when denying the request for a certificate of appealability, as it is clear from the record that the Petitioner made far more than a substantial showing of the violation of his constitutional rights.

II.

The Petitioner further submits that he presented sufficient evidence of his attorney's conflict of interest that demonstrated a violation of his Sixth Amendment right to effective assistance of counsel.

An attorney suffers under a conflict of interest when "he is prevented, from his own self interest or by his interest in another's welfare, from vigorously promoting the welfare of his client." *Vega v. Johnson*, 149 F.3d 354, 360 (5th Cir. 1998). A defendant proves an actual conflict of interest when he proves (1) that the attorney labored under a conflict (2) that adversely affected his lawyer's

performance. *United States v. Martinez*, 151 F.3d 384, 393 (5th Cir. 1998). In order to prove adverse effect, the defendant must prove that "some plausible defense strategy or tactic might have been pursued but was not, because of the conflict of interest." *Hernandez v. Johnson*, 108 F.3d 554, 560 (5th Cir. 1997).

The Petitioner contends that his counsel labored under an actual conflict of interest due to the fact that he was under investigation for suborning perjury by the same United States Attorney's office which was prosecuting the Petitioner.

In *United States v. Greig*, 967 F.2d 1018 (5th Cir. 1992), the Fifth Circuit determined that an actual conflict of interest existed when defendant's counsel was under investigation legally and ethically for actions taken in his representation of his client. The court found that

> there is little doubt that an actual conflict existed here.

> Here, counsel was in the position of simultaneously having to defend himself as well as his client regarding their potentially criminal activity. Like his client, counsel was open to an indictment for obstruction of justice... At the very least, counsel faced severe disciplinary measures.

Id. at 1022-23. The *Greig* court found that counsel was preoccupied with his own liability which resulted in counsel failing to "defend Greig vigorously and single-mindedly completely free from his own necessity of avoiding incrimination, sanctions or even disbarment." The court reasoned that "counsel must have been plagued by the fear of sanctions" and the uncertainty of whether his indictment was forthcoming. *Id.* at 1024. As a result, the court found that counsel failed in his duty to protect and advance his client['s interest. *Id.* at 1026.

Two concerns are raised when counsel is under investigation by the same authority as his client. First, the attorney may attempt to curry favor for

himself with the prosecutor and in the process sell out his client. Second, the attorney may be bitter towards the prosecution and in the process alienate the prosecution resulting in a more fervent prosecution. *Vance v. Lehman*, 64 F.3d 119, 124-25 (3rd Cir. 1995).

In the Petitioner's case, after a bond revocation hearing, the United States began an investigation into whether counsel for the Petitioner knowingly suborned perjury. The Government has never denied such an investigation took place. Further, the Petitioner presented evidence in his § 2255 motion, in the form of an affidavit, that counsel admitted to another that he knew he was under investigation at the time he handled the Petitioner's case. Further, the Petitioner included an affidavit from attorney Joe Turner, who indicated that he was told by the United States Attorney's office that counsel Goldstein was under investigation arising from his handling of

Petitioner's case. The Petitioner asserts that as a result of his own investigation, counsel entered into plea negotiations with the Government. What resulted was a plea which had no benefit whatsoever for the Petitioner, but which included significant benefit for the Government.

In fact, the agreement was so skewed to the Government that had the Petitioner proceeded to trial, lost, and received every enhancement applicable in the Guidelines, he would not have received as high of a sentence as he received by the terms of the plea.

The district court, in dismissing this claim without a hearing, accepted the Magistrate's findings in its entirety. The Magistrate first found "It is uncontested that Goldstein was not guilty of any misconduct, nor did he violate the law." The Magistrate further found that although the investigation was "annoying" for Goldstein, there was "absolutely no

evidence" that Goldstein knew of the prosecution; therefore, he could not have been effected adversely by the investigation.

The Petitioner contends that these conclusions are incorrect. First, the Petitioner presented an affidavit from investigator Ken Cummins which indicated that both Goldstein and his assistant, Pat Peranteau, were aware of the investigation. There was no counter affidavit from the Government indicating anything different. In fact, the Government admitted to attorney Turner that an investigation was conducted. Goldstein never made an appearance, by affidavit or otherwise. The only evidence on this issue supported the allegation that Goldstein did know about the investigation.

Further, the Magistrate found that the investigation "annoyed" Goldstein. Again, there is no evidence in the record to support this theory. However, if the

investigation was annoying, then that obviously implies that Goldstein was aware of the investigation. One cannot be annoyed with an investigation of which one is unaware.

Further, the fact that counsel was not actually convicted of any misconduct does not indicate that no conflict existed. In *Greig*, the focus was not on conviction, but investigation. The Court determined that the fear of sanctions or indictment was what lead to the conflict. *Greig* at 1024. Therefore, the fact that counsel was ultimately not charged is of no consequence. The fact that counsel was not charged could be seen as resulting from counsel's conduct in currying favor with the Government in advising his client to accept a deal which benefitted the Government.

Finally, the Magistrate ignored the fact that after the investigation began, counsel began plea negotiations and allowed

the Petitioner to enter into a horrible deal. No competent counsel would allow their client to enter into an arrangement whereby they were to receive a higher sentence than if they went to trial. Mr. Goldstein was or should have been well aware of the effects of the plea on the Guidelines. Counsel's conduct can only be attributed to the fact that he was suffering under a conflict of interest. As such, the court was in error in dismissing this claim without a hearing.

The Petitioner can prove that this conflict of interest actually prejudiced his case. First, counsel's conduct in ingratiating himself to the AUSA's office did result in a bad plea agreement for the Petitioner in that it agrees to a misapplication of the Guidelines, resulting in a minimum 31 month increase in the Petitioner's sentence.

The Appellant's Guidelines were calculated using the conspiracy to import

heroin and witness tampering. Each of these were treated as separate, non closely related counts.

The Fifth Circuit has found, in *United States v. Winn*, 948 F.2d 145 (5th Cir. 1991), that counts such as those in the Petitioner's case are required to be grouped, and an enhancement under obstruction of justice given. *Id.* at 162. If this calculation is taken in the Petitioner's case, then the Petitioner's offense level would have been 37, not 38 as calculated. This would have resulted in a sentencing range of 210-262 months. The Petitioner received a sentence of 293 months. Therefore, at a minimum, this miscalculation cost him 31 additional months in prison. Counsel was aware of the *Winn* case at the time of the plea. His decision, to allow the Petitioner to agree to this miscalculation, amounts to clear prejudice.

The Petitioner would also note

counsel's diatribe against the Petitioner at sentencing, in which counsel berated his own client before the court and indicated his desire not to represent his client. Counsel's adverse position, with regards to his own client, cannot be seen as counsel being an advocate on his client's behalf, but rather an attempt to distance himself from his client, for his own interests, which amounts to an actual conflict of interest.

CONCLUSION

For these reasons, a certificate of appealability should have issued. The Petitioner should have been permitted to proceed to the Fifth Circuit Court of Appeals for review of the merits of his constitutional claims raised in his § 2255 motion, as he made a substantial showing of the denial of his Sixth Amendment right to effective assistance of counsel under the applicable standard necessary for granting a certificate of appealability.

Respectfully submitted,

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APPENDIX

1. FIFTH CIRCUIT COURT OF APPEALS ORDER SEPTEMBER 23, 1999.

2. FIFTH CIRCUIT COURT OF APPEALS ORDER AUGUST 4, 1999.

3. DISTRICT COURT ORDER NOVEMBER 4, 1998.

4. DISTRICT COURT ORDER SEPTEMBER 1, 1998.

5. MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, AUGUST 17, 1998.

APPENDIX 1
COURT OF APPEALS OPINION (9/23/99)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

98-51144

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KAMALBHAI KANTI PATEL, also known as Kamal Patel, also known as Kamalbhai Pate,

Defendant - Appellant

Appeal from the United States District Court for the Western District of Texas, Austin

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BEFORE: POLITZ, WIENER, and STEWART, Circuit Judges.

BY THE COURT:

A member of this panel has previously denied Appellant's motion for certificate of appealability. After consideration by this panel upon request of Appellant, IT IS ORDERED that Appellant's motion for reconsideration is DENIED.

APPENDIX 2
COURT OF APPEALS OPINION (08/04/99)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

98-51144
USDC No. A-97-CV-311-JN
USDC No. A-92-CR-11-1-JN

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KAMALBHAI KANTI PATEL, also known as Kamal Patel, also known as Kamalbhai Pate,

Defendant - Appellant

Appeal from the United States District Court for the Western District of Texas

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ORDER

Federal prisoner Kamal Patel seeks a certificate of appealability (COA) to appeal from the denial of his motion for relief pursuant to 28 U.S.C. § 2255. Patel contends taht he received ineffective assistance of counsel due to conflicts of interest, due to poor advice regarding the plea agreement, due to failures at sentencing, and due to the failure to file a notice of appeal when asked; that his plea was involuntary due to coercion by the Government; that his plea was involuntary because the district court failed to review certain provisions of the plea agreement with him at the plea hearing; that the Government breached the plea agreement by moving for an upward departure; that he was

entitled to a new sentencing hearing because of a conflict between the oral sentence and the written sentence; and that he was entitled to an evidentiary hearing.

A COA may be issued only if the prisoner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2255(c)(2). Despite a plethora of filings and counter filings, Patel has not made such a showing nor does the record before us reflect such; accordingly, his COA motion is DENIED.

"/s Henry A. Politz".
HENRY A. POLITZ
UNITED STATES CIRCUIT JUDGE

A true copy
Test:
Clerk of U.S. Court of Appeals, Fifth Circuit
By "/s".
Debbie Krammy, Deputy
New Orleans, Louisiana August 04, 1999

APPENDIX 3
DISTRICT COURT ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KAMAL PATEL — CIVIL NO. A-97-CA-311-JN
CRIM NO A-92-CR-11(1)-JN

VS.

UNITED STATES OF AMERICA

ORDER

Before the Court is Movant's Request for Certificate of Appealibility (Clerk's Doc. No. 215) filed November 2, 1998. Upon Movant's Request, the applicable legal authorities and the entire case file, the court enters the following Order.

On September 1, 1998, this Court entered judgment denying Movant's request for habeas corpus relief pursuant to 28 U.S.C. § 2255. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended the habeas corpus statute to provide that an appeal may not be taken to the Court of Appeals from a district judge's final order in a proceeding under section 2255 unless a "circuit justice or judge"[1] issues a certificate of appealibity. 28 U.S.C. § 2253(c)(1)(B).

An applicant for certificate of

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[1] The Fifth Circuit has held that a district court has the authority to issue a certificate of appealabilty under the AEDPA amendments to Federal Rule of Appellate Procedure 22 (b) and 28 U.S.C. § 2253(c). *See Else v. Johnson*, 104 F.3d 82,83 (5th Cri. 1997).

appealability must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, the movant must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. *See Drinkard v. Johnson*, 97 F.3d 751, 755 (5th Cir. 1996). Movant has failed to make a substantial showing of the denial of a constitutional right. Accordingly, the Court finds that Movant's motion for certificate of appealability should be denied.

IT IS THEREFORE ORDERED that Movant's Request for Certificate of Appealability is hereby DENIED.

SIGNED AND ENTERED this 4th day of November 1998.

"s. James R. Nowlin"
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX 4
DISTRICT COURT FINAL JUDGMENT AND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KAMAL PATEL

CIVIL NO. A-97-CA-311-JN
CRIM NO A-92-CR-11(1)JN

VS.

UNITED STATES OF AMERICA

FINAL JUDGMENT

Before the Court is the above entitled cause of action. Upon review of the entire case file and this Court's Order, which accepted the Report and recommendation of the Magistrate Judge, the Court enters the following Final Judgment in this cause pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED, ADJUDGED AND DECREED that the above entitle cause of action is hereby DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that this cause is CLOSED and that any pending motions are hereby DENIED AS MOOT.

SIGNED AND ENTERED THIS 31ST day of August, 1998.

"s James R. Nowlin "
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KAMAL PATEL

CIVIL NO. A-97-CA-311-JN
CRIM NO A-92-CR-11(1)JN

VS.

UNITED STATES OF AMERICA

ORDER

Before the Court is the above entitled cause of action. This cause was referred to the United States Magistrate Judge for findings and recommendations pursuant to 28 U.S.C. § 636(b) and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. The Magistrate Judge filed his Report and Recommendation on August 17, 1998. Petitioner file his Objections to the Report and Recommendation on August 31 1998. The Government filed its Amended Motion to Amend the Magistrate Judge's Report and Recommendation on August 21, 1998.

In light of the Objections, the Court has undertaken a *de novo* review of the entire case file in this cause and finds that the Recommendation filed by the Magistrate Judge is correct and should be approved and accepted by the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the United States Magistrate Judge's Report and Recommendation filed in this cause is APPROVED and ACCEPTED by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Government's Amended Motion to Amend the Magistrate's Report and Recommendation is hereby GRANTED and that page 23-24 of the Magistrate Judge's Report and Recommendation is hereby AMENDED to

reflect that the Cummins affidavit indicated that Mr. Prenteau, not AUSA Pierce, stated that "he had no doubt that AUSA Pierce would relish bringing criminal charges against Mr. Goldstein."

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence is hereby DENIED.

SIGNED AND ENTERED this 31st day of August, 1998.

"s. James R. Nowlin "
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX 5
REPORT AND RECOMMENDATION OF MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KAMAL PATEL
Movant

No. A-97-CA-311-JRN
(A-92-CR-011(1) JN)

v.

UNITED STATES OF AMERICA
Respondent

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE JAMES R. NOWLIN UNITED STATES DISTRICT JUDGE

The Magistrate Court submits this Report and Recommendation to the United States District Court pursuant to 28 U.S.C. § 636(b) and Rule 1 of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges, as amended, effective January 1, 1994.

Before the Court is Kamal Patel's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed on April 23, 1997 (Doc. #173) and attached Memorandum of Law in Support. On July 7, 1997, the Government filed a Response (Doc. #179). The Movant requested and was granted permission to amend his memorandum of law. (Doc. #181). Movant then filed a reply on September 11, 1997 (Doc. #184) and the Government filed a Response to the Reply on October 20, 1997

(Doc. #188). Movant moved to have the Government's reply stricken or, in the alternative, requested permission and an extension of time to file a reply. The Motion to Strike was denied and Movant's motion to file a reply to the Government's reply was granted with a reply date of July 10, 1998, later extended by motion of Patel to July 27, 1998. Movant's Reply to the Government's Supplemental Response was filed July 30, 1998 (Doc. #201).

GENERAL BACKGROUND

Movant, Kamal Patel, was charged in a two-count indictment with conspiracy to import heroin, a Schedule I Controlled Substance, into the United States, in violation of 21 U.S.C. §§ 963 and 952 (count one), and use and attempted use of physical force and threats against a witness, Ejike Okoli, with intent to influence the testimony of Patel's co-defendant Ikwuemesi Okoli[1] in an official proceeding, in violation of 18 U.S.C. § 1512(b)(1) (count two).

The Presentence Report (PSR)[2] recites a

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[1]Ejike Okoli is the brother of Ikwuemesi Okoli

[2]A Presentence Investigation Report (PSR) provides objective and factual information relating to the defendant and the crime. In the Fifth Circuit, the PSR is considered to be reliable and may be considered as evidence in resolving any disputed factors at the sentencing. United States v. Brown, 54 F.3d 234, 242 (5th Cir. 1995); United States v. Vital, 68 F.3d 114,120 (5th Cir. 1995). A court may adopt facts in the PSR without further inquiry if the facts had an adequated evidentiary basis and the defendant does not present evidence to refute them. United States v. Valencia, 44 F.3d 269, 274 (5th Cir. 1995); United States v. Puig-Infante, 19 F.3d 929, 943 (5th Cir.), cert. denied, 513 U.S. 864 (1994).

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complicated history of the events leading to Patel's conviction and lengthy sentence, which the Court will not repeat verbatim herein. In relevant summary, Patel's roommate Ikwuemesi Okoli ("Ike") was approached in the summer of 1991 by individuals seeking someone to import heroin into the United States from the Far East. At the time, Patel was in his first year at the University of Texas School of Law and Ike was completing his senior year at the University of Texas. Ike and Patel agreed to import heroin for these individuals and recruited two women to act as couriers. A complicated scheme was developed in which Ike and Patel orchestrated the importation of the heroin with trips to the Far East and Germany (meeting up with the women), while the women performed the actual importation. Patel was involved in securing a passport for one of the women and provided the funds for at least some of the importation.

As a result of an anonymous tip in October of 1991, one of the women was detained in Atlanta on December 2, 1991 as she returned from Germany. Customs agents seized one thousand three hundred seventy four grams (1,374 grams or 1.37 kilograms) of 87 pure heroin from a suitcase the woman was carrying. Patel had not been present during this December importation trip but was actively involved during a prior trip in September of 1991 in which 1.2 kilograms of

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The PSR generally bears sufficient indicia of reliability to be considered as evidence by the district court in resolving disputed facts. United States v. Montoya-Ortiz, 7 F.3d 1171, 1180 (5th Cir. 1993). In making factual determinations, the Fifth Circuit has held that a district court may "draw inference[s] from a variety of data, including information in the [PSR] and the defendant's statements and demeanor at the sentencing hearing." United States v. Mejia-Orosco, 867 F.2d 216, 220-21 (5th Cir.), cert. denied, 492 U.S. 924 (1989).

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heroin was imported. Approximately 2.8 kilograms was ultimately imported as a result of the conspiracy.

Although other co-conspirators came to Austin in an attempt to locate the woman, they were unable to do so.[3] Based on verbal threats from the co-conspirators, Ike and Patel believed the woman would have been in danger if these individuals found her, so they failed to effectively cooperate in the search for the woman and the missing heroin.

After the woman was detained, she cooperated and named Ike Okoli and the other woman as co-conspirators. The other woman was arrested and also cooperated. The second woman contacted Ike, indicating that she was in possession of the missing suitcase. When Ike came to her house to pick it up, he was arrested. Ike then also began cooperating and identified Patel as a co-conspirator. A warrant was issued for Patel and Patel turned himself in on January 9, 1992. A search of his and Ike's residence found that Patel possessed counterfeit identification for himself and blank cards for making additional counterfeit military identification cards. Additional documents were found connecting Patel to the funding of the heroin trafficking activities.

Patel was granted pretrial release, while Ike was detained. Patel learned that Ike was making statements that incriminated Patel. Patel created a scheme in which he planned to abduct Ike's brother Ejike Okoli ("Ejike") and then force Ejike to communicate to Ike's uncle a statement that if Ike did not recant and/or stop testifying and stop his incrimination of Patel, Ejike was "dead." In furtherance of this plan,

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[3]This of course, is because she had been in federal custody since her arrest at the Atlanta airport.

Patel and his girlfriend set up an elaborate alibi so that Patel would not be suspected of the kidnapping Patel purchased a stun gun, crossbow, and handcuffs for use in the abduction. Unfortunately for Patel, the kidnapping on the night of April 2 went awry: Ejike resisted, was shot in the arm with the crossbow and then escaped, taking with him the stun gun. Patel skedaddled for Oklahoma in furtherance of his alibi. Based on Ejike's statements, a motion was made to revoke Patel's supervised release and a hearing was held before the undersigned. Although the undersigned smelled something rotten in the alibi, the evidence, including receipts, testimony of uninterested witnesses who allegedly observed Patel on his way to Oklahoma on April 2 (the afternoon of the kidnapping) and the testimony of Patel's girlfriend, mother, and uncle all seemingly established that Patel was either well on his way to Oklahoma or was actually in Oklahoma during the time of the kidnapping. As such, the undersigned again released Patel on pretrial release.

After hundreds of hours of investigation, agents eventually determined (and the girlfriend ultimately confessed) that Patel was indeed behind the kidnapping and injury of Ejike. In August of 1992, Patel was rearrested and incarcerated after waiving his right to another detention hearing. At that time, the superseding indictment charged Patel with conspiracy to import heroin, and had additional charges of false statements and fraud in connection with the identification documents.

During the course of plea negotiations, the indictment was amended to charge Patel with conspiracy to import heroin and use and attempted use of physical force and threats against a witness, Ejike Okoli, with intent

to influence the testimony of Ike Okoli[4] Patel entered a plea of guilty to both counts. Retained counsel for Patel, Gerry Goldstein, stipulated in the plea agreement with the Government that, with respect to the heroin charge, Patel had imported between 2.6 and 2.8 kilograms, was a manager or supervisor, and had obstructed justice by means in addition to the charge of witness tampering. In the second count, Goldstein stipulated that Patel had used more than minimal planning to commit the kidnapping, Ejike received injuries between a bodily injury and a serious bodily injury, Patel obstructed justice during the investigation of the offense, a dangerous weapon was used, and that Patel was an organizer, leader or manager of the offense. In the plea agreement, the Government reserved its right to move for an upward departure. In the agreement, Patel waived his right to file a direct appeal and also the right to file a proceeding under 28 U.S.C. § 2255 unless the Court departed upward.

Patel's mother had also been charged by this time for perjury in connection with her statement at the detention hearing that Patel had telephoned her at a certain time (which receipt showed that the phone call was made from Oklahoma a few hours prior to the kidnapping in Austin) and told her he was on his way home and was already in Oklahoma.[5] Patel's plea agreement was tied

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[4]The fraud charges were dropped in the superseding indictment.

[5]Patel argues that his mother did not in actuality perjure herself because all she said was that he telephoned her and said he was in Oklahoma and she did not say he was actually in Oklahoma (which would have been a lie). However, Patel ignores the fact that Patel did not, in fact, telephone her at all

to his mother's plea of guilty to the perjury charges. In other words, the Government would not give either Patel or his mother a plea agreement unless they both plead guilty. Ultimately, both Patel and his mother plead guilty. Gerry Goldstein was also retained by the Patel family to represent Mrs. Patel.

At the Rule 11 proceeding, the District Court inquired as to Patel's level of education and determined that Patel fully understood the proceeding. The Government then read the plea agreement and the Court held a colloquy as follows:

> THE COURT: Mr. Patel, do you understand the plea agreement?
>
> MR. PATEL: Yes, sir.
>
> THE COURT: And you have had an opportunity to review the entire plea agreement?
>
> MR. PATEL: Yes, sir.
>
> THE COURT: Do you agree with it?
>
> MR. PATEL: Yes, sir.
>
> THE COURT: Mr. Patel, you're charged by superseding information in Count 1 with conspiracy to import heroin, a Schedule I Narcotic Drug, in violation of Title 21, United States Code, Section 963 and 962, and in Count 2 with witness tampering in violation of Title 18, United States Code, Section 1512 (b)

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that evening and that it was a friend of his who telephoned her for the express purpose of setting up a phone receipt to support Patel's alibi.

(1). . . . . Now do each of you[6] understand that you have the right to plead not guilty to those charges or to continue with a plea of not guilty if that plea has already been made?

MR. PATEL: Yes, sir.

THE COURT: Knowing this-then, to the charges as I've just read them as they affect you each individually, Mr. Patel, how do you wish to plead, guilty or not guilty?

MR. PATEL: Guilty.

(Rule 11 hearing, pp. 16-17)

THE COURT: Have you had an opportunity to discuss the charges that you're pleading guilty to this morning with your lawyer?

MR. PATEL: Yes, sir.

THE COURT: And have you had an opportunity to discuss with your lawyer any possible defense or defenses that you might have to those charges?

MR. PATEL: Yes, sir.

THE COURT: Do you understand the charges?

MR. PATEL: Yes, sir.

THE COURT: Have any questions about the charges?

MR. PATEL: (Mr. Patel nods head from side to side).

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[6]Ike Okoli plead guilty at the same proceeding.

> THE COURT: Mr. Patel, what's in the superseding information in those two counts that I just read to you that you just plead guilty to, that's what you did --
>
> MR. PATEL: Right.
>
> THE COURT: --and that's what you're pleading guilty to?
>
> MR. PATEL: Yes, sir.

(p. 18).

The record further reflects that the United States summarized the evidence in the case and Patel advised the court that he agreed with it; (pp. 21-30). The record further shows that in response to the Court's inquiries, Patel stated he had been given ample opportunity to discuss his case with his attorney; he was satisfied with his attorney; he knew that he had a constitutional right to a trial by jury on the charges contained in the superseding information; he knew that he had a right to the assistance of a lawyer at every stage of the proceedings; and he understood that he was presumed innocent and the government was required to prove his guilt beyond a reasonable doubt. (pp. 34-35). Patel further advised the Court that he understood that if he wished to continue his plea of guilty, he would be waiving his right to a trial and all the other constitutional rights the Court had just advised him of, and that the Court would enter a judgment of guilty and later sentence him after considering a presentence investigation report. (p. 36). The Court then asked Patel if, after having been advised of his rights, did he still wish to plead guilty. Patel responded, "yes, sir." (p. 37). The Court then asked Patel if he was entering a

plea of guilty because he was in fact guilty and for no other reason, to which Patel replied, "yes, sir." The Court then advised Patel of the nature of the charges and the maximum penalty that could be imposed. In doing so, the following colloquy took pace between the Court and Patel:

> THE COURT: Mr. Patel, do you understand that the maximum possible penalty under Count 1 of the information is life imprisonment and/or a fine of four million dollars? And Count 2 is ten years of imprisonment and/or a fine of $250,000? And because the offense in Count 2 was committed while you were on pretrial release, in addition to the sentence proscribed for the offense, you will be sentenced to a term of imprisonment of not more than ten years which shall be consecutive or on top of any other sentence to imprisonment. Do you understand that Mr. Patel?
>
> MR. PATEL: Yes, sir.

(Rule 11 hearing, p. 38).

> THE COURT: Do you understand that the mandatory minimum penalty under Count 1 is ten years of imprisonment and/or a fine of four million dollars and that you will not be eligible for probation?
>
> MR. PATEL: Yes, sir.

(pp. 38-39).

> THE COURT: In addition, you'll be assessed a term of supervised release of at least five years. And I tell both you and Mr. Okoli that

supervised release is a term of supervision which you must serve after completing any initial term of confinement. A violation of the conditions of your supervised release may subject you to imprisonment for a period equaling the entire term of supervised release without any credit to you for the amount of time you've already spent on supervised release. Now, do each of you understand that?

MR. PATEL: Yes, sir.

THE COURT: Then the total maximum, the total maximum penalty -- possible penalty for the offense that you're pleading guilty -- or offenses you're pleading guilty to, Mr. Patel, could be life imprisonment plus a fine of $4,250,000 plus a term of supervised release at least five years. Do you understand that?

MR. PATEL: Yes, sir.

(p. 39).

THE COURT: . . . Are you pleading guilty freely and voluntarily?

MR. PATEL: Yes, sir.

THE COURT: Has anyone threatened either of you or forced either of you to plead guilty in any form or fashion?

MR. PATEL: No, sir.

THE COURT: Has anyone made any promise to either of you other than what's contained in the plea agreements that you've made with the government that caused you to plead

guilty?

MR. PATEL: No, sir.

THE COURT: Now, do each of you understand that this court is not required to accept the plea agreement that you have entered into with the government, and the court could reject those plea agreements?

MR. PATEL: Yes, sir.

THE COURT: If the plea agreement in either of your cases should be rejected by the court, you'll be told about that in open court, and then you'll have an opportunity, if you want to, to withdraw you guilty plea. Understand that?

MR. PATEL: Yes.

THE COURT: Has anyone made any prediction, prophecy, or promise to either of you as to what your sentence will be? Anybody made a promise to you that if you plead guilty, you'll get a specific sentence?

MR. PATEL: No, sir.

THE COURT: Okay, Mr. Patel, are you satisfied than that you want to continue with your guilty plea?

MR. PATEL: Yes, sir.

THE COURT: Do you want to withdraw your guilty plea?

MR. PATEL: No, sir.

THE COURT: Then the court finds that with regard to each of these

> defendants, they each understand the charges and the penalties, each of the defendants understands their constitutional and statutory rights and desire to waive them or give up those rights, each of the defendants fully understands the charges and penalties and their pleas are freely and voluntarily made, the defendants are competent to stand trial and there's a factual basis for each of the pleas.

The day after the plea proceeding, Patel apparently communicated to Gerry Goldstein his desire to withdraw his plea. Goldstein told him if he withdrew the plea, he (Goldstein) refused to represent him anymore. Patel then stated he would not withdraw the plea and requested that Goldstein continue to represent him.

After the Rule 11 hearing, there was a break of some five months prior to sentencing, during which time the Presentence Report (PSR) was drafted. In the PSR, the two offenses were found not to be closely related for purposes of grouping.[7]

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[7]The Guidelines direct that "all counts involving substantially the same harm shall be grouped together in a single group." U.S.S.G. § 3D1.2. Under § 3D1.2(c), if the conduct in one count embodies conduct that is treated as a specific offense characteristic on the other count, the counts should be grouped. The section then lists certain offenses which should always be grouped, certain other offenses which should never be grouped, and concludes that for multiple offenses not listed in either group, a case-by-case determination must be made based upon the facts of the case. Commentary no. 5 indicates, under similar facts, that separate offenses occurring at separate times should not be grouped. Under the facts of this case, if the two offenses were considered to be closely related, the obstruction enhancement in count one would arguably have been double counting when considering the conviction in count two.

For the conspiracy to import heroin conviction, Patel was assigned a base offense level of thirty-two (32) for importing more than one kilogram (1 kg.) but less than three kilograms (3 kg.) of heroin. Patel received a three (3) level increase for his position as a manager and a two (2) level enhancement for obstruction based on Patel's instructions to his girlfriend to conceal his involvement in the drug importation scheme and his attempt to bribe a witness to lie to an investigator. Patel was denied an acceptance of responsibility. Patel's adjusted offense level for count one was therefore 37.

On the second count of witness tampering, the base offense level was fifteen (15). Patel received a two (2) point enhancement for more than minimal planning, four (4) points for possession of a weapon during the offense, three (3) points for Ejike's injuries, two (2) points for Patel's role in the offense, three (3) points for committing the offense while on pretrial release, and two (2) points for obstruction, resulting in an adjusted offense level of thirty-one (31). The two offenses were then combined. The offense level of 37 is six points higher than the second offense level of 31, resulting in a calculation of 1 1/2 units and a combined offense level of thirty-eight (38). See U.S.S.G. § 3D1.4. An offense level of 38 yields a Guidelines range of 235-293 months.

At the plea hearing, counsel for Patel, Gerry Goldstein and Goldstein's associate, Patrick Peranteau, were both present. Goldstein began the proceedings by

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However, a sentence for witness tampering is supposed to be served consecutively. It is arguable that another possible result was to delete the obstruction enhancement and the combining of the two groups and then impose the 120 month sentence in count two to run consecutively.

expressing his displeasure at Patel's conduct in attempting to influence Ike Okoli's testimony and in concocting the alibi, and Goldstein indicated that he had asked the family to be taken off the case. Goldstein stated he felt Patel had manipulated him, embarrassed him, and compromised the judicial process; and that Patel had placed his family and loved ones in jeopardy. Having said that, counsel proceeded to defend Patel by arguing that Patel should be granted a reduction for acceptance of responsibility under the unusual facts of the case and also successfully argued that the Court should not depart upwards. Co-counsel Peranteau also argued that Patel felt remorse and was deeply regretful for his actions.

The Government argued at sentencing that Patel should receive an enhancement because of the purity of the heroin (87%), the use of more than one dangerous weapon, and that the Guidelines did not take into account that a kidnapping occurred as opposed to merely witness tampering.

After declining to depart upward, United States District Judge James R. Nowlin sentenced Patel to a 293 month term of imprisonment, followed by a five-year term of supervised release, and ordered him to pay a $100,000 fine, $5,172.50 in restitution and a $100 mandatory assessment. Patel asserts that he asked counsel to file a direct appeal but counsel told him he couldn't because the plea agreement waived Patel's right to appeal. As such, Patel did not file a direct appeal of his conviction or sentence.

CLAIMS RAISED

Patel alleges numerous claims, both substantive and related to his claim of ineffective assistance. The claims will be addressed in turn as follows:

I. Ineffective assistance claims:

A. Failure to file a notice of appeal;

B. Multiple conflicts of interest;

1. Counsel was himself under investigation for his alleged role in the creation of the alibi for the detention hearing;
2. Counsel was also representing Patel's mother;
3. Because counsel was paid by Patel's parents, counsel's loyalty was more tied to them;
4. Counsel failed to request a Garcia hearing even though he should have recognized the conflict;
5. Counsel permitted the Government to be coercive in only offering "tied" pleas to Patel and his mother;

C. Counsel was ineffective at the sentencing hearing;

1. Counsel erred in not letting Patel offer restitution to Ejike Okoli;
2. Counsel made negative comments about Patel;
3. Counsel did not argue for the lower end of the Guidelines range;
4. Counsel failed to offer Ejike Okoli's testimony that he believed Patel did not mean to shoot him.

D. Counsel improperly threatened to withdraw representation from Patel when Patel wanted to

withdraw his plea.

E. Counsel's performance due to his conflicts prejudiced Patel;

1. Counsel improperly advised Patel to take a plea agreement that had no benefit to it and agreed to enhancements that did not need to be conceded;
2. Counsel failed to object to the fact that the offenses should have been grouped;
3. Counsel failed to argue withdrawal as a defense;

II. The Government breached the plea agreement by arguing evidence at the sentencing hearing contrary to the stipulations in the plea agreement.

III The plea was coerced by threats against Patel's family.

IV. The District Court violated Rule 11 by failing to ensure that Patel's plea of guilty was voluntary;

V. The plea was void *ab initio* because a condition precedent did not occur;

VI. The written judgment and commitment order contradicts the sentence the court orally imposed at sentencing; and

VII. Patel did not knowingly and voluntarily waive his right to file a S 2255 motion as part of the plea agreement.

STANDARD OF REVIEW FOR § 2255 MOTIONS

After a defendant has been convicted and has exhausted his direct appeal, a court

is to presume that the defendant stands fairly and finally convicted. United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc), cert. denied, 502 U.S. 1076 (1992). There are generally four grounds upon which a defendant may move to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255: (1) the sentence was imposed in violation of the Constitution or the laws of the United States; (2) the district court was without jurisdiction to impose the sentence; (3) the sentence imposed was in excess of the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. United States V Placente, 81 F.3d 555, 558 (5th Cir. 1996). A defendant may not challenge a district court's technical application of the Sentencing Guidelines in a § 2255 motion because such claims do not give rise to a constitutional issue cognizable under § 2255. United States v. Payne, 99 F.3d 1273, 1281-1282 (5th Cir. 1996). Section 2255 "is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage of justice." United States v. Sealer, 37 F.3d 1131, 1133 (5th Cir. 1994).

I. Ineffective Assistance of Counsel

Patel argues that he was denied effective assistance of counsel, a claim cognizable under § 2255. However, "proving an allegation of ineffective assistance of counsel requires a very strong showing by the defendant." United States v Samuels, 59 F.3d 526, 529 (5th Cir. 1995). There is a "very strong presumption that the performance of the counsel falls within the wide range of reasonable professional assistance." Id.

In Strickland, the Supreme Court

developed a two-prong test for resolving ineffective assistance of counsel claims. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under the Strickland test, Patel must show that (1) counsel's performance was objectively deficient and (2) he was thereby prejudiced. United States V. Walker, 68 F.3d 931, 933 (5th Cir. 1995), cert denied, 516 U.S. 1165 (1996). Under Strickland, a defendant must prove that his attorney's performance was deficient to a constitutional degree and that the errors were of a nature that the defendant was deprived of a fair trial: a trial whose result is reliable. Belveu v. Scott, 67 F.3d 535, 538 (5th Cir.), cert denied, 517 U.S. 1144 (1996)

The first prong of the Strickland test asks whether counsel's performance was "deficient" under an objective standard of reasonableness. Spriggs v. Collins, 993 F.2d 85, 87 (5th Cir. 1993). The second test asks whether any deficiencies "prejudiced" the defendant. Id. at 85, 87. To establish prejudice, Patel must show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. United States v. Kinsey, 917 F.2d 181, 183 (5th Cir. 1990) (citing Strickland, 466 U.S. 687-688, 694 (1984)). A failure to meet either requirement necessarily defeats the claim.

Lincecum v. Collins, 958 F.2d 1271, 1278 (5th Cir.), cert denied, 506 U.S. 957 (1992). Moreover, a court need not examine whether counsel's performance was deficient before addressing the prejudice prong. Strickland, 466 U.S. at 697; Walker, 68 F.3d at 933.

To sustain an ineffective assistance of counsel claim when the defendant has pleaded guilty, the defendant must show: (1) that his counsel's performance fell below an objective standard of reasonableness, and (2) that this deficiency was prejudicial to

his defense. Hill v. Lockhart 474 U.S. 52, 58, 106 S.Ct. 366, 370 (1989); Green v. Lynaugh, 868 F.2d 176, 177 (5th Cir.), cert. denied, 493 U.S. 831 (1989). In the guilty plea context, the defendant must show that there is a reasonable probability that, but for his attorney's errors, he would not have pleaded guilty. Hill, 474 U.S. at 591 106 S.Ct. at 370. Once a defendant enters a plea of guilty, he may attack only the "voluntary and intelligent character" of the plea, he may not thereafter raise independent claims relating to the deprivation of constitutional rights or other such nonjurisdictional claims that do not challenge the court's jurisdiction. Tollett V Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973); United States v. Smallwood, 920 F.2d 1231, 1238 (5th Cir.), cert. denied, 501 U.S. 1238 (1991). With the above standards in mind, the undersigned explores Patel's claims of how counsel rendered ineffective assistance.

A. Failure to File Notice of Appeal

Patel argues that his sentence should be reversed and he should be resentenced because his attorney failed to file a notice of appeal in his case. Patel indicates that, after sentencing, he told his attorney that he wanted to file an appeal. Patel states that his attorney told him he couldn't appeal because he had entered a plea of guilty and waived the right to appeal. The statement of counsel was correct in that Patel had waived his right to appeal. Patel does not indicate that after being told of the waiver, he again instructed his attorney to appeal regardless of the waiver On this basis alone, the claim should be denied.

Patel asserts regardless that ineffective assistance has been established as a matter of law due to his attorney's

refusal to file an appeal, citing United States v Gibson, 985 F.2d 212 (5th Cir. 1993). There are clear distinctions between Gibson and the current case, most notably that Gibson was a jury trial, while the instant case was a guilty plea, with a plea agreement which waived Patel's right to appeal or file a § 2255 motion. The right to appeal a criminal conviction is a statutory right not a constitutional right. Abnev v United States, 431 U.S. 651, 656 (1977). A defendant may waive statutory rights, including the right to file a motion to vacate sentence under 28 U.S.C. § 2255, as part of a plea bargaining agreement. United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994). Patel waived his right to appeal his sentence or to file a § 2255 motion as part of the plea agreement. Wilkes, 20 F.3d at 652-653. Patel was advised of the waiver at rearraignment, and he knew that by virtue of the plea agreement, he was giving up the right to appeal. Patel knew his attorney was not going to file a notice of appeal for him, and he knew the notice of appeal had to filed within 10 days after entry of judgment.

When Patel's attorney stated that Patel had waived his right to appeal, Patel could have used the other options that were available to him. Namely, Patel could have (1) filed the notice of appeal pro se; (2) requested that the district clerk's office file it for him; (3) hired a new attorney; or (4) petitioned the court for appointment of counsel and filed an in forma pauperis affidavit. Patel did not choose any of these options. See, e.g., United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1988). Instead, he argues that, because counsel did not file the notice of appeal for him, he was denied the effective assistance of counsel and that he should now be resentenced. This argument is illogical, because the sole remedy for denial of the

right to appeal is the grant of an out-of-time appeal. Even if Patel had filed an appeal, the appeal would have been dismissed due to Patel's waiver of his right to appeal. As such, it could not have been ineffective assistance not to file an appeal. The undersigned finds that Patel has failed to establish that he reiterated his request that retained counsel appeal and that counsel refused this request. Therefore, this claim should be denied.

B. Multiple Conflicts of Interest

Patel alleges that he was denied the effective assistance of counsel because: (1) his attorney was under investigation by the Assistant United States Attorney prosecuting Patel; (2) counsel was also representing Patel's mother; (3) counsel was paid by Patel's parents and was therefore loyal to them and not him; (4) counsel failed to request a Garcia hearing; and (5) counsel permitted the Government to be coercive in offering only "tied" pleas to Patel and his mother.

Although Patel asserts that his conflicts claims should be examined under Cuyler V. Sullivan, 446 U.S. 335, 345-58, 100 S.Ct. 1708, 1716-23 (1980), the Fifth Circuit has limited Cuyler to conflicts resulting from a lawyer's representation of multiple criminal defendants and held that Strickland presented the more appropriate analysis for other claims of attorney conflict of interest, applying an ineffective assistance standard to the

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[8]Cuyler is routinely applied to cases in which the attorney conflict resulted from serial representation of criminal defendants as well as simultaneous representation of multiple defendants in the same proceeding. See, e.g., Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114 (1987).

analysis. See Beets v. Scott, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc) cert. denied, 517 U.S. 1157 (1996) (citing Nix v. Whiteside, 475 U.S. 157, 165-66, 106 Sat. 988, 993 (1986)).

Even under Cuyler, until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. Beets, 65 F.3d at 1266 (citing Cuyler, 446 U.S. at 349-50, 100 S.Ct. at 1719). There is a clear outer bound on the phrase "actively represented conflicting interests." See Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988 (1986). In Whiteside, counsel conditioned his representation on Whiteside not committing perjury. Id. at 161, 106 S.Ct. at 991. The Supreme Court held that a "conflict" between a lawyer's ethical obligation not to aid perjury and a client's desire to commit perjury "is not remotely the kind of conflict of interests dealt with in Cuyler." Id. at 176, 106 S.Ct. at 999. The Court stated "if a `conflict' between a client's proposal and counsel's ethical obligation gives rise to a presumption that counsel's assistance was prejudicially ineffective, every guilty criminal's conviction would be suspect if the defendant had sought to obtain an acquittal by illegal means." Id.

Based on the foregoing, the Court applies the Strickland framework to all of the conflicts claims other than the claim for multiple representation and applies the Cuvler test to the claim that counsel was conflicted by his representation of both Patel and his mother.

1. Government's Investigation of Counsel

Patel asserts that because Gerry Goldstein was being investigated for having knowledge of or encouraging the

perjury that occurred at Patel's April 1992 bond revocation hearing, he was irrevocably conflicted with his client. In support of Patel's claim, he submits the affidavit of Investigator Kenneth Cummins. The affidavit indicates that Goldstein believed that AUSA Sharon Pierce wished to prove that he had been aware of the fact that Patel's and Patel's witnesses had planned a false and perjurious defense during Patel's bond hearing on April 11, 1992; and that Ms. Pierce, at least prior to an investigation into Goldstein, believed that Goldstein had encouraged the perjurious conduct of his client and his client's witnesses. The Cummins affidavit states that AUSA Pierce apparently indicated that she would "relish bringing criminal charges against Patel's attorney." A subsequent affidavit of Austin attorney Joseph A. Turner indicates that AUSA Pierce had "looked at Mr. Goldstein's involvement but never uncovered any evidence he [Goldstein] had any prior knowledge his client had concocted a false alibi."

When a criminal defendant asserts that an investigation of the criminal activities of his attorney creates a conflict between the attorney's interest in protecting himself from criminal investigation and the defendant's interest in effective representation, an "actual conflict of interest" exists only where there is a danger that the defense attorney would ineffectively represent his client because of fear that authorities might become aware of the attorney's own misconduct if he undertook effective representation. Cerro v. United States, 872 F.2d 780, 785-86 (7th Cir. 1989) (No actual conflict of interest where there was no danger that authorities would learn something novel about counsel's possible involvement in criminal activities....").

To present a valid claim of ineffective assistance of counsel, a defendant must show that counsel advanced counsel's own interest

to the detriment of defendant. United States v. Taylor, 139 F.3d 924, 929 (D.C. Cir. 1998) (applying Cuyler test to claim counsel conflicted by unrelated investigation into counsel's legal misconduct); United States v. Sayan, 968 F.2d 55, 64-65 (D.C.Cir. 1992) (no actual conflict when attorney who was appointed one week before trial failed to request a continuance allegedly because he was afraid of adverse consequences to him and his firm if he filed such a motion); United States v. Michaud, 925 F.2d 37, 40-42 (1st Cir. 1391) (no Sixth Amendment violation when defense attorney in tax case taught classes to IRS agents on how to detect tax fraud); United States v. Salerno, 868 F.2d 524, 540-41 (2nd Cir.), cert. denied, 493 U.S. 811 (1989) (no actual conflict or adverse effect when attorney and his firm were being investigated by the government and were allegedly unusually cooperative with the government in defendant's case); United States v. Horton, 845 F.2d 1414, 1418-21 (7th Cir. 1988) (no actual conflict and no adverse effect when attorney was "serious" candidate for U.S. Attorney during his representation of the defendant); Roach v. Martin, 757 F.2d 1463, 1479-80 (4th Cir.), cert denied, 474 U.S. 865 (1985) (no actual conflict when attorney was being investigated by state bar while representing defendant);

In the current case, it is uncontested that Goldstein was not guilty of any misconduct, nor did he violate the law. This case is therefore unlike United States v. Greip, 967 F.2d 1018 (5th Cir. 1992) and United States v. White, 706 F.2d 506 (5th Cir. 1983), in which counsel in actuality had violated the law and/or ethical canons. In the current case, although an investigation may well have been extremely annoying for Goldstein, there is absolutely no evidence that he thought he might be prosecuted. As such, there is no evidence

that his actions with respect to Patel were taken out of fear that the Government would uncover criminal misconduct by Goldstein. For that reason, there is no conflict and the claim fails under both Strickland and Cuyler.

2. Multiple Representation of Patel and his Mother.

For this claim, the Court applies the Cuyler framework. Under Cuyler, the threshold for reversal of a criminal conviction is lower but still requires a significant showing. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708 at 1719 (1980); Perillo v. Johnson, 79 F.3d 441, 449-51 (5th Cir. 1996) (finding conflict when lead defense attorney also represented "star" state's witness and trial strategy was constrained by dual representation).

Patel argues that there was an actual conflict because his attorney represented both him and his mother. Counsel represented Patel in the instant case, and Patel's mother, Hasmukh Patel, in a separate prosecution after she was charged with perjury as a result of her testimony at Patel's bond hearing. Patel was not charged with perjury, and he was not charged in the same indictment as his mother. "A conflict exists when defense counsel places himself in a position conducive to divided loyalties." United States v. Carpenter, 769 F.2d 258, 263 (5th Cir. 1985). "An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing." United States v. Placente, 81

F.3d 555, 558-59 (5th Cir. 1996).

The Court can find no indication in the current case that in representing Patel and his mother, counsel in any way "sacrificed one client's interest for the other." Beets v. Scott, 65 F.3d 1258, 1269 (5th Cir. 1995), cert. denied, 517 U.S. 1157 (1996). The undersigned has not identified any evidence which should have been admitted or credible arguments which could have been made on behalf of Patel that were not made because counsel was also representing Patel's mother. The evidence against Patel was strong, as was the evidence against his mother. The mere fact that counsel represented both parties in related litigation does not, standing by itself, show that counsel had divided loyalties. No evidence has been proffered to show that counsel favored Patel's mother over Patel or acted in a way to benefit Mrs. Patel to Patel's detriment. Despite Goldstein's statements at the beginning of the sentencing hearing, he later vigorously argued that an upward departure was inappropriate and argued that Patel should receive a downward departure. As such, there was no adverse affect and no conflict.

3. Counsel's Loyalty was to Patel's Parents Because They Paid Him

Patel next asserts that counsel was subject to a conflict of interest because Patel's parents paid counsel's bill. This argument is patently frivolous even in the context of counsel's representation of Patel's mother. The Fifth Circuit has held that counsel for a defendant may be paid for by a co-defendant without even triggering the need to hold a Garcia hearing absent a showing of actual conflict. United States v. Corona, 108 F.3d 565, 568 (5th Cir. 1997). The mere fact that counsel was paid by Mr. and Mrs. Patel does not show that counsel was biased

in favor of Mrs. Patel.
The undersigned recommends that the District Court deny this claim.

4. Failure to Request Garcia Hearing.

Patel's counsel advised the Court at sentencing that he was displeased with his client and had asked the Patels if someone else could appear as counsel for Patel. Patel contends that because his attorney voiced his displeasure before the Court, there was a clear conflict of interest and the court should have, at that point, conducted a Garcia hearing. See United States v. Garcia, 517 F.2d 272, 277-78 (5th Cir. 1975).

In a Garcia hearing (commonly held when the same counsel represents multiple defendants in the same proceeding), the district court addresses each defendant personally and advises him of the potential dangers of representation by counsel with a conflict of interest and ensures that the waiver of conflict-free counsel is knowing. However, "a trial court does not always have an affirmative duty to inquire into the possibility of a conflict of interest, but it does have a duty to conduct a hearing once it has been alerted and certainly when it knows of the existence of an actual conflict of interest." United States v. Greig, 967 F.2d. 1018, 1022 (5th Cir. 1992).

In the current case, there was no need to hold a Garcia hearing because there was no "conflict" in the legal sense. Patel appears to analogize "conflict" to "disagreement" or "dispute." There is no doubt that Goldstein disagreed with Patel's actions. However, this does not rise to the level of "conflict" in the legal sense so as to require that counsel request a Garcia hearing. If Patel's interpretation was true, every time an attorney said something negative about his client or expressed displeasure at his client's action (even if

the statements were based on strategic reasons) the Court would be required to hold a Garcia hearing.

Given the undersigned's experience, Garcia hearings would become quite frequent: Garcia was not meant to stretch so far. Because there was no conflict, there was no ineffective assistance for failing to request a Garcia hearing.

5. Counsel Ineffective due to Mandatory "Tied" Guilty Pleas

Patel next asserts that counsel should have prevented the plea agreements of Patel and his mother from being "tied." As explored more fully below in the Rule 11 analysis section of this Report, nothing prohibits the Government from "tying" guilty plea agreements. United States v. Holland, 117 F.3d 589, 593-94 (D.C. Cir. 1997); United States v. Gonzales. 918 F.2d 1129, 1134 (3rd Cir. 1990). From the record, AUSA Pierce appears to have been adamant on the issue of tied plea agreements. As such, there has been no showing that Goldstein could have done anything to alter the fact that the only plea agreement offer was for tied pleas. Pate''s only alternative was to not plead guilty and have his mother also not plead guilty or to plead without a plea agreement.

Patel had a right to enter a plea of guilty. However, there is no constitutional right to a plea agreement. Russell v. Collins, 998 F.2d 1287, 1294 (5th Cir. 1993), cert. denied, 510 U.S. 1185 (1994) (prosecutor has discretion to plea bargain with some defendants and not others); United States v. Crain, 33 F.3d 480, 487 (5th Cir. 1994), cert. denied, 513 U.S. 1169 (1995). The Fifth Circuit has held that a prosecutor may condition a plea agreement on all co-defendants' acceptance of a guilty plea package. Crain, 33 F.3d at 487.

Patel fails to explain how he would have defended himself if he had gone to trial (as opposed to pleading guilty without a plea agreement). The evidence against Patel, namely the testimony of his co-conspirators and Ejike Okoli, the documentary evidence of his financial interest in the heroin trafficking, and evidence of his travels in furtherance of the conspiracy, all show that even if Patel had gone to trial, he would have been

convicted. In addition, his scheme with respect to Ejike Okoli certainly shows consciousness of guilt of the underlying offense. There is no allegation of actual innocence and such an assertion would clearly be unsupported by the evidence. With respect to Mrs. Patel, the evidence as to her guilt was also clear. Either party could have plead guilty without benefit of a plea agreement. Perhaps from the perspective of hindsight, it would have been better for Patel to simply plead without an agreement.

Regardless, an attorney's conduct is judged at the time of the conduct. "Given the almost infinite variety of possible trial techniques, a court must be careful not to second-guess legitimate strategic choices which may now, under the distorting light of hindsight, seem ill-advised and unreasonable." Sawyer v. Butler, 848 F.3d 582, 588 (5th Cir. 1988), *superseded on other grds*, 881 F.3d 1273 (5th Cir. *en banc* 1989); see also Pratt v. Cain, 142 F.3d 226, 231 (5th Cir. 1998).

Counsel is not required to be perfect, merely competent. Patel has failed to show that counsel was ineffective for not attempting to persuade the Government to not tie the pleas. As such, this claim fails.

C. Counsel was ineffective at the sentencing hearing

Patel next argues that counsel was ineffective in several ways during the sentencing hearing in that (1) counsel erred in not letting Patel offer restitution to Ejike; (2) counsel improperly made negative remarks about Patel; (3) counsel did not argue for the lower end of the Guidelines; and (4) counsel failed to offer the testimony of Ejike Okoli. The Court addresses each argument in turn.

1. Counsel erred in not letting Patel offer restitution to Ejike

Okoli

Patel asserts that counsel was ineffective for telling Patel and his parents that they should not [9]attempt to offer restitution to Ejike Okoli. Counsel's rationale for this was that it might appear to be witness tampering and, after the previous debacle involving Ejike, it was better to be cautious. Counsel clearly stated at the sentencing hearing that he had advised Patel not to offer any money to Ejike and that he had forgotten about the Crime Victims' Fund. Counsel also stated at the hearing that Patel and his parents were "ready and willing" to reimburse Ejike or the Crime Victims' Fund. Given the magnitude of Patel's conduct and the fact that both of his offenses were enhanced for separate occasions of obstruction of justice, it was improbable if not impossible that Patel would have received an acceptance reduction. There has been no showing that counsel's advice not to pay Ejike or the Crime Victims' Fund had any effect on the Court's decision not to grant Patel an acceptance of responsibility reduction. As such, counsel was not ineffective.

2. Counsel made negative comments about Patel

At the sentencing hearing, counsel made negative comments about Patel's actions with respect to his elaborate cover-up of his illegal activity concerning Ike and Ejike Okoli. Whether counsel had made these statements or not, Patel's activities with respect to his efforts to prevent Ike from cooperating were well known to the Court.

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[9]This issue only related to whether or not Patel received an acceptance of responsibility reduction.

Given the magnitude of Patel's deception on the Court, counsel's statements could not have affected the Court's decision on sentencing. Counsel vigorously argued that Patel should not receive an upward departure due to the concessions made in the plea agreement and that he was already punished under the Guidelines for his misconduct. The fact that counsel made negative comments does not change the facts of this case. The undersigned recommends that the District Court find that counsel was not ineffective on this ground.

3. Counsel did not argue for the lower end of the Guidelines range.

Patel argues that counsel was ineffective for conceding that a sentence at the top of the Guidelines was sufficient. Patel ignores the fact that the Government had just vehemently argued that an upward departure was required to adequately address Patel's misconduct, which it perceived as including a charge of attempted murder and kidnapping. The kidnapping and subsequent injury to a Government witness in an effort to coerce another witness not to testify truthfully is an extremely serious charge. Goldstein successfully avoided an upward departure by vigorously arguing that the Guidelines took Patel's misconduct into account. His strategy decision to make this argument resulted in Patel not receiving an upward departure.

4. Counsel did not offer Ejike Okoli's testimony that he believed Patel did not mean to shoot him.

Patel asserts that counsel was ineffective for failing to offer the testimony of Ejike Okoli at the sentencing hearing. Ejike apparently would have testified that he did not believe Patel meant to hurt him. However, Patel does not

offer any proof the Ejike's testimony in fact would have been favorable to him. The undersigned can visualize several scenarios in which Ejike's testimony could have been damaging to Patel and could have encouraged the Court to depart upwards. The undersigned will not second-guess the strategy choices of an experienced criminal lawyer without a far more significant showing that the missing testimony would not have hurt Patel and would have helped him. As such, the undersigned recommends that this claim be denied.

D. Counsel Improperly Threatened to Withdraw.

Patel asserts that when he told counsel the day after his plea that he wanted to withdraw it, counsel told him that if he sought to withdraw his plea, counsel would request that he be let off the case. Although an attorney is "stuck with" a case until the Court excuses the attorney from further representation, there is nothing improper about an attorney telling his client that due to disagreement with the client's proposed actions, he wishes off the case.

A defendant has no absolute right to withdraw a guilty plea; however, the district court may permit withdrawal before sentencing upon a showing of a "fair and just reason." United States v Still, 102 F.3d 118, 123-24 (5th Cir. 1996), cert. denied, __ U.S. __ 118 S.Ct. 43 (1997); Fed. R. Crim. P. 32(e). The district court's decision is discretionary and will not be disturbed absent an abuse of discretion. Id. at 123. Factors to consider when applying this standard of a fair and just reason are whether:

(1) the defendant has asserted his innocence;
(2) withdrawal will prejudice the

government;
(3) the defendant delayed in filing his withdrawal motion;
(4) withdrawal would substantially inconvenience the court;
(5) close assistance of counsel was available to a defendant;
(6) the plea was knowing and voluntary; and
(7) withdrawal would waste judicial resources.

United States v Brewster, 137 F.3d 853, 857-58 (5th Cir. 1998). The decision to permit or deny withdrawal is based on the totality of the circumstances. Still, 102 F.3d at 124. The burden of establishing a fair and just reason for withdrawing a guilty plea rests with the defendant. Id.

Counsel for Patel clearly believed that withdrawal of the guilty plea was not justified under the above criteria. The arraignment proceeding establishes that Patel's plea of guilty was knowingly and voluntarily made. Patel advised the Court that he had entered into a plea agreement with the United States on his awn volition and without coercion or any misunderstandings. Patel advised the court that he understood the agreement and agreed with it. Judge Nowlin asked Patel if he understood that by entering into the agreement, he would be waiving certain rights, to which Patel acknowledged that he understood.

An attorney is not obligated to take actions which he feels are ethically questionable, as the request for withdrawal of a plea can be under certain circumstances. Patel swore in open court at the plea proceeding that he was guilty. Given Patel's history, counsel may have been afraid that if Patel was to attempt to withdraw his plea, perjury might occur in that proceeding. Counsel was free to at least attempt not to be a part of an effort

to withdraw the plea. As such, there was no ineffective assistance.

E. Counsel's Performance Prejudiced Patel.

Patel asserts that counsel's performance prejudiced him in several ways, each of which the Court explores in turn.

1. Counsel Improperly Advised Patel to Take the Plea Agreement.

Patel asserts that counsel was ineffective for advising Patel to take the plea. After review, the Court agrees that the sentence in this case is likely not significantly less than Patel would have received had he gone to trial and been convicted. However, the evidence is clear that Patel was guilty of importation of at least 1,000 grams of heroin and it is highly unlikely that Patel would have received a lesser sentence once he had been convicted of that degree of importation. The Court is unable to see the benefit of going to trial merely for its own sake when Patel would certainly have been convicted. By pleading guilty, Patel may have avoided receiving an upward enhancement, as the Government clearly would have continued to argue even more fervently after trial that Patel deserved an upward departure. The Court can find no enhancement that would not have been applied even without counsel's stipulations. Counsel was clearly hoping for an acceptance reduction, which was within the discretion of the Court. Counsel is not ineffective for failing to predict whether the Court will allow a reduction. Perhaps, with the benefit of hindsight, Patel should have plead without a plea agreement, although the Court is unable to see what real benefit this would ultimately have given Patel. The undersigned does not find that counsel's performance prejudiced Patel on this issue.

2. Counsel Failed to Object to the Counts Not Being Grouped

Patel asserts that his two convictions should have been grouped under the Guidelines. Section 3D1.2 of the Guidelines states: all counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule: (a) When counts involve the same victim and the same act or transaction. (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts. (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior. U.S.S.G. § 3D1.2.

In the current case, the counts were not grouped because they did not fall into any of the above categories. The PSR specifically states that the conduct leading to the obstruction of justice enhancement on the first count was Patel's actions in encouraging his girlfriend to lie about his involvement in heroin importation and his offer to pay a witness to lie to an investigator not his activities with respect to Ejike and Ike Okoli. As such, the conduct embodied in Count Two was not connected to the conduct embodied in Count One and the offenses were not subject to grouping. For that reason, Patel was not prejudiced by the failure of counsel to object. Indeed, Patel forgets that the

conviction for witness tampering technically should have been imposed consecutively. The fact that the sentences were imposed concurrently certainly did not prejudice Patel.

3. Counsel Did not Pursue a Withdrawal Defense

Patel asserts that he withdrew from the conspiracy by not participating in the final heroin shipment and by counseling Ike not to continue in his heroin importation activities. Patel argues that counsel was ineffective for failing to investigate and assert a withdrawal defense.

A defendant is presumed to continue involvement in a conspiracy unless that defendant makes a "`substantial' affirmative showing of withdrawal, abandonment, or defeat of the conspiratorial purpose." United States v Caicedo, 103 F.3d 410, 412 (5th Cir. 1997) (citing United States v Branch, 850 F.2d 1080, 1082 (5th Cir.1988), cert. denied, 488 U.S. 1018 (1989); see also United States v. Torres, 114 F.3d 520, 525 (5th Cir. 1997) (same). "A member of a conspiracy continues to be responsible for acts committed by coconspirators even after the former's arrest unless he has withdrawn from the conspiracy." Id. (citing United States v. Killian, 639 F.2d 206, 209 (5th Cir.) (citations omitted), cert. denied, 451 U.S. 1021 (1981)). "The burden of proving withdrawal from a conspiracy rests upon the defendant." United States v. Hill, 42 F.3d 914, 917 (5th Cir. 1995).

To withdraw from a conspiracy, a defendant must show that he has committed "[a)ffirmative acts inconsistent with the object of the conspiracy [that arel communicated in a manner reasonably calculated to reach conspirators." Caicedo, 103 F.3d at 412 (citing United States v. U.S Gvpsum, 438 U.S. 422, 464 (1978); United States v. Puig-Infante, 19 F.3d 929, 945

(5th Cir.), cert. denied, 513 U.S. 864.

In the current case, Patel has failed to show that he fully withdrew from the conspiracy. There is evidence that even if he told Ike he did not want to participate anymore, he assisted in the search for the missing heroin. A withdrawal defense would have doubtless been futile and thus counsel was not ineffective. In addition, even if the defense was successful, it would not have reduced Patel's sentence. It is uncontested that Patel was involved in the September importation of approximately 1,200 grams. Withdrawal from the conspiracy would not immunize Patel from liability for that amount. Patel was sentenced for a range of between 1,000 and 3,000 grams. Thus, whether Patel withdrew from the conspiracy was irrelevant.

II. The Government Breached the Plea Agreement When it Moved for an Upward Departure.

Patel concedes that the plea agreement expressly preserved the Government's right to move for an upward departure. However, Patel asserts that because the Government argued facts contrary to the stipulations contained in paragraphs 2, 3, 4, and 5 of the plea agreement, it breached the Agreement.

Paragraph 2 of the agreement stated that the parties stipulated that the amount of heroin imported into the United States involved between 2674 and 2874 grams of heroin. Paragraph 2 also stated that this amount would be used to determine Patel's base offense level. Paragraph 3 of the agreement stipulated that Patel was a manager and supervisor. Paragraph 4 stipulated that Patel obstructed or impeded, or attempted to obstruct or impede, the administration of justice as defined in § 3C1.1 of the Sentencing Guidelines; the obstruction or attempt to obstruct justice

was covered under § 2J of the guidelines and were not controlled by Application Note 6 of § 3C1.2; and the base offense level would be increased by 2 levels for obstruction of justice and the increase was appropriate because counts one and two were not closely related counts under § 3D1.2 of the guidelines. Paragraph 5 further stipulated that Patel used more than minimal planning to commit count two of the indictment; Ejike Okoli suffered bodily injuries as a result of Patel's actions; Patel willfully obstructed justice during the offense charged in count two of the indictment; Patel used a dangerous weapon during the commission of the offense charged in count two of the indictment; and Patel's role in the offense charged in count two was set forth in S 3B1.1(c) of the Sentencing Guidelines.

Patel states that the Government improperly argued at sentencing that there was (1) more heroin than the amount stipulated to in the plea agreement; (2) two weapons and not just one were involved; and (3) that the guidelines did not take into account the kidnapping of Ejike.

Contrary to Patel's assertion, the Government did not argue a greater amount of heroin than the amount stipulated to in the agreement. Rather, the Government argued that the high level of purity of the amount of stipulated heroin justified an upward departure. With respect to the weapon (the stun gun) being argued, the agreement stipulates that a weapon was involved, but it does not say "only one weapon" was involved. As such, it was not improper to argue that the stun gun justified enhancement. Last, the plea agreement clearly reflects that Ejike Okoli was the subject of a kidnapping attempt, therefore the Government was not breaching the plea but rather bringing relevant facts to the attention of the Court.

The undersigned believes that this

claim lacks merit and should be denied. In addition, because there was no breach in arguing the above facts, counsel was not ineffective for failing to object.

III. Coerced Guilty Plea

Patel asserts that the Government coerced his guilty plea in that the Government made improper threats to prosecute members of Pate''s family even though they lacked probable cause to do so. With respect to Patel's mother, the claim is patently frivolous, as she was ultimately convicted of perjury in connection with her testimony at Patel's detention hearing. Although Patel's father was not charged, he could easily have been involved in the alibi attempt, as Patel's uncle clearly was. The Government had probable cause to investigate the individuals who assisted Patel in creating his false alibi. Therefore, it was not coercion to tell Patel that an investigation was continuing. Indeed, Patel was fully aware that his mother had been charged with an offense prior to his plea. As such, the Government clearly had probable cause to investigate Patel's mother and other members of the family and the plea was not improperly coerced.

IV. Rule. 11 Violation

Patel next contends that the District Court should have made a special inquiry as to voluntariness because his plea was "tied" to his mother's. "Rule 11(c) (1) has three core concerns: the plea must be free from coercion, the accused must understand the nature of the charges against him, and the accused must know the direct consequences of his guilty plea." United States v Stumpf, 900 F.2d 842, 844 (5th Cir. 1990). The wiring of a plea is a "material detail" about which the court should be informed; such pleas "could be coercive, especially when

family members are involved." United States v. Hernandez, 79 F.3d 1193, 1194 (D.C. Cir. 1996). As long as the District Court is aware that a plea is wired, there is no Rule 11 violation so long as the defendant indicates that the plea is voluntary. Holland, 117 F.3d at 594. A district court does not have to "undertake a special voluntariness inquiry when faced with a wired plea." Id.; United States v Farley 72 F.3d 158, 164 (D.C. Cir. 1995). A claim of an unwilling plea fails when the colloquy established that the defendant was aware of the consequences of his plea and stated that he was pleading guilty voluntarily. United States v. Cervantes, 132 F.3d 1106, 1111 (5th Cir. 1998).

In the current case, the fact that the plea was wired was clearly revealed in the plea agreement, which was read in court during the plea hearing. As such, the Court was certainly aware of. the fact that the plea was connected to Mrs. Patel's plea. During the hearing, Patel affirmed that he had not been threatened or coerced into pleading guilty. Patel's admissions under oath form a formidable barrier to any subsequent collateral proceeding. Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); United States v. Diaz, 733 F.2d 371, 373-374 (5th Cir. 1984).

V. The Plea was Void *Ab Initio* Because a Condition Precedent Did Not Occur

The plea agreement contains a provision in which Patel agrees that he and his father will not contest forfeiture of the $5,000 bond deposited when Patel was released on pretrial release. After Patel's sentencing, the District Clerk sent a notice to Patel informing him of the bond's existence and inquiring as to whether he or his father desired to claim the bond amount. The bond was apparently later refunded to Patel's

father. Patel asserts that his father's seeking of the bond amount rendered the plea void.

The undersigned believes that Patel's argument on the above is patently frivolous. The breach, if any, was done by Patel or his father, not the Government. The Government is well within its rights to demand specific performance regardless of any breach by the defendant or his representatives. As such, the undersigned recommends that the District Court deny this claim.

VI. The Written Judgment Contradicts the Oral Sentence

Patel argues that the judgment and commitment order contradicts the sentence the district court actually pronounced at sentencing. The court, at sentencing, issued a sentence on count one of 293 months and a 120 month term of imprisonment on count two, to be served concurrently, followed by a five-year term of supervised release, and ordered Patel to pay a fine in the amount of $100,000, restitution in the amount of $4,652.50 payable to Mr. Ejike Okoli, $520.00 to the Office of the Attorney General, and a $100 mandatory assessment fee. Because Patel's offenses indicated that consecutive sentences should be imposed (within the Guidelines range) for Count One, the written judgment reflected a consecutive thirteen month sentence after the ruuning of 280 months, resulting in the same 293 sentence. Patel's sentence was not affected by this revision. To solve any discrepancy, the undersigned recommends that the District Court issue a corrected judgment and commitment order reflecting the actual sentence as orally rendered by the Court at sentencing. Although this may be appealable by the Government due to the lack of the statutorily required consecutive sentences, it certainly is not appealable by Patel since the sentence as orally rendered is

within the Guidelines and is not otherwise improper.

VII. The Waiver of a § 2255 Motion was not Knowing or Voluntary

Patel contends that he did not knowingly or voluntarily waive his right to file a post-conviction motion as part of the plea agreement. The plea agreement Patel signed and acknowledged in open court is clear and unambiguous. Patel voluntarily waived his right to file a § 2255 motion when he entered into the plea agreement with the United States. United States v. Portillo, 18 F.3d 290, 292 (5th Cir. 1994).

Paragraph 8 of the plea agreement specifically stated the following in regards to Patel's waiver of his right to file a § 2255 motion:

> Defendant is aware that his sentence will be imposed in conformity with the Federal Sentencina Guidelines and Policv Statements. The Defendant is also aware that a sentence imposed under the Guidelines does not provide for parole. Knowing these facts, Defendant agrees that this Court has jurisdiction and authority to impose any sentence within the statutory maximum set for his offense, including a sentence determined by reference to the Guidelines, and he expressly waives the right to appeal his sentence on any ground, including any appeal right conferred by 18 U.S.C. § 3742. Similarly, the Defendant agrees not to contest his sentence or the manner in which it was determined in any post-conviction proceeding, including, but not limited to, a proceeding under 28 U.S.C. § 2255.

> However, should the Court depart upwards from its guideline calculation, then in that event, the Defendant could appeal the justification for and imposition of such an upward departure, but no other fact or issue related to the sentence imposed.

Paragraph 9 of the agreement states:

> The Defendant is aware that any estimate of the probable sentencing range that he may receive from his counsel, the government or the probation office, is a prediction, not a promise, and is not binding on the United States, the probation office or the Court. Realizing the uncertainty in estimating what sentence he will ultimately receive, the Defendant knowingly waives his right to appeal the sentence or to contest it in any post-conviction proceeding in exchange for the concessions made by the United States in this agreement.

Patel was given the opportunity to review the plea agreement. Patel stated in open court that he understood and agreed with the agreement. If Patel did not understand a term contained in the agreement, it was his obligation to inquire. Because the undersigned believes the waiver was valid, Patel's right to file a § 2255 was waived.

More importantly, even if the waiver was not valid, the undersigned has explored each of Patel's claims on the merits in the alternative and found they lack merit. Therefore, the waiver is irrelevant.

CONCLUSION

In summary, Patel has failed to establish, under the Strickland standard and the legal authorities set out above, that his counsel's performance was deficient and that the deficient performance was prejudicial to his defense or that had it not been for his counsel's performance the results of the proceedings would have been different. Patel has further failed to establish that he is entitled to relief on any of his other claims.

RECOMMENDATION

The Magistrate Court recommends that the District Court **DENY** the Motion to Vacate, Set Aside, or Correct Sentence filed by movant. The Magistrate Court further recommends that Patel be warned that he must obtain prior approval from the Fifth Circuit Court of Appeals before filing a successive motion to vacate, set aside, or correct sentence.

WARNING

The movant may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. Battle v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within ten (10) days after the party is served with a copy of the Report shall bar that party from de novo review by the district court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal

conclusions accepted by the district court. See 28 U.S.C. 636 (b) (1)(C); Thomas v Arn, 474 U.S. 140, 150-153, 106 S.Ct. 466, 472-74 (1985); Douglas v. United Services Automobile Association, 79 F.3d 1415, 1428-29 (5th Cir. *en banc*, 1996).

The Clerk is directed to send a copy of this Report and Recommendation to counsel for the defendant by certified mail, return receipt requested and to the Government by regular mail.

SIGNED this 17th day of August, 1998.

s/ Stephen H. Capelle
STEPHEN H. CAPELLE
UNITED STATES MAGISTRATE JUDGE